SINGAPORE REPORTS.

THE SINGAPORE HARBOUR BOARD v. THE FIRESTONE TIRE AND RUBBER COMPANY (S.S.) LTD.

[Court of Appeal (Murray-Aynsley, C. J., Evans and Gordon-Smith, JJ.) March 28, 1950]

[Singapore — Civil Appeal No. 28 of 1949]

Public Authorities Protection Ordinance — Warehousing of goods by Singapore Harbour Board — Failure to deliver to holder of Delivery Order — Liability of Public Authority for goods lost.

This was an appeal from the judgment of Mr. Justice Brown (reported in (1950) M.L.J. 47). The learned trial Judge found that the Singapore Harbour Board were liable for damages for loss of certain goods belonging to the plaintiffs-respondents which had been transferred from ships to the godowns of the Singapore Harbour Board and that the Singapore Harbour Board were not in the circumstances protected by the Public Authorities Protection Ordinance as he found that the Board was acting in pursuance of an implied contract between them and the owners of the goods. The Singapore Harbour Board appealed from this judgment.

Held, (Murray-Aynsley, C. J. and Gordon-Smith, J. (Evans, J. dissenting)), that in the present case the appellants were directly performing their duties under the Ports Ordinance and were therefore entitled to the protection of the Public Authorities Protection Ordinance.

Cases referred to:—

(1) *Bullen v. Swan Electric Engraving Co.* (1907) 23 T.L.R. 238.
(2) *Lloyd v. Grace, Smith & Co.* (1912) A.C. 716.
(3) *The Aralia* (1949) 82 Lloyd's List Rep. 886.
(4) *Coldman v. Hill* (1919) 1 K.B. 731.
(5) *The Ydun* (1899) P. 236.
(6) *Sharpington v. Fulham Guardians* (1904) 2 Ch. 449.
(7) *Midland Railway Co. v. Withington Local Board* (1893) 11 Q.B.D. 788.
(8) *Davies v. Swansea Corporation* (1853) 8 Exch. 808.
(9) *Wallace v. Smith* (1804) 5 East 115.
(10) *Irving v. Wilson* 4 Term Rep. 485.
(11) *Ambler v. Bradford Corporation* (1902) 2 Ch. 585.
(12) *Parker v. London County Council* (1904) 2 K.B. 501.
(13) *Carpue v. London, Brighton and South Coast Railway* (1844) 5 Q.B. 747.
(14) *Palmer v. Grand Junction Railway* (1839) 4 M. & W. 749.
(15) *Kent v. Great Western Railway* (1846) 3 C.B. 714.
(16) *Lyles v. Southend Corporation* (1905) 2 K.B. 1.
(17) *Pearson v. Dublin Corporation* (1907) A.C. 351.
(18) *Bradford Corporation v. Myers* (1916) A.C. 242.
(19) *Griffiths v. Smith* (1941) A.C. 170.
(20) *Hawkes v. Torquay Corporation* (1938) 4 All E.R. 16.
(21) *Clarke v. Bethnal Green Borough Council* (1939) 55 T.L.R. 519.
(22) *Western India Match Co., Ltd. v. Lock and Others* (1946) 1 K.B. 601.
(23) *Reeve v. Palmer* 5 C.B. (N.S.) 84.

CIVIL APPEAL from the judgment of Brown, J.

C. H. Smith (*L. A. J. Smith* with him) for the appellants.

Dr. C. H. Withers-Payne for the respondents.

The facts and arguments sufficiently appear from the judgments below.

Cur. Adv. Vult.

Murray-Aynsley, C. J.: — In this case the facts are simple and the legal issues are clearly defined. The appellants are a statutory body in whom are vested the docks of Singapore. They also are responsible for the management of the undertaking and undertake various operations in connection with the loading and unloading of ships.

In the present case certain goods belonging to the respondents were unloaded from a ship known as the "Samokla". They were removed from the ship in the docks by servants of the appellants into a godown belonging to the appellants and from thence they were moved, again by servants of the appellants to lorries, at which point the responsibility of the appellants ceased. At some time during this operation certain of the goods of the respondents were lost. It is not known what happened to them. In these circumstances the respondents claimed damages for the loss. The learned Judge found in their favour and the Harbour Board appealed.

The first question to be decided is whether the respondents in fact and law have established the right to damages. The second question is whether, having established this right, they are barred by the Public Authorities Protection Ordinance.

On the first point, the appellants were bailees for reward. The respondents have not established any positive negligent act or omission. The appellants have not, on the other hand, shown the cause of the loss. The position of a bailee for reward is defined briefly in *Hailsham* Vol. 1, para. 1234: "When a chattel intrusted to a custodian is lost . . . . . the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property." The article continued "If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred". This passage refers to *Bullen v. Swan Electric Engraving Co.*[1]. That decision appears to be based on certain views as to the responsibility of masters for the acts of their servants which were superseded by *Lloyd v. Grace, Smith & Co.*[2]. I do not think that a bailee could now be considered to have discharged the onus put upon him unless the possibility of misconduct or negligence of his servants is excluded.

In my opinion the whole matter would be clear if it proceeded on the lines of the old action of detinue. The bailor set out the fact of the bailment and the failure to redeliver. To this the bailee had to plead. In the present case the appellants say, in effect, that the goods in question may have been stolen without negligence on their part or they may have been delivered in error to the wrong consignee. They contend that the decision in *The Aralia*[3] is in their favour. That case was complicated by the fact that two causes of action of different kinds were under consideration at the same time — a claim by a bailor against a bailee, and a claim for damages caused by collision. The basis of the collision claim was really *res ipsa loquitur*. The defendant showed that there were two possible causes one of which imported negligence and the other did not. That, according to the learned Judge, disposed of the *res ispa loquitur*. He also disposed of the claim by the bailor on the same ground. If the learned Judge was satisfied that of the various hypotheses, one, which did not import negligence, was the more probable, then I think that his decision was correct. If, on the other hand, he considered that either hypothesis was equally probable, I think that it was wrong. The judgment is not clear on the point. We have to consider if an alternative plea of this sort would be a good answer to a claim in detinue. In my opinion, it would not. The matter has become somewhat confused by the fact, that, as, for a long time, it was open to a defendant in detinue to wager his law, plaintiffs were driven to bring an action on the case for negligence. There the burden of proof would be reversed. In my opinion the appellants have not answered the claim in detinue. The learned Judge who tried the case found a specific act of negligence, in the omission of the appellants to take certain steps after the loss. For this he relied on *Coldman v. Hill*[4]. I do not agree with him on this point, as I do not consider that in the circumstances that authority is applicable; it is not, in view of what I have decided, necessary to go into the question in detail.

A more troublesome point is whether the appellants are entitled to rely on the Public Authorities Protection Ordinance (Cap. 14).

It is conceded that the appellants are a public authority within the meaning of the Ordinance in question, which for the present purpose may be treated as being the same as the English Act of 1893.

The appellants are a statutory body incorporated by the Ports Ordinance (Cap. 149). Section 4(4) provides — "The duty of carrying out this Ordinance shall . . . . be vested in bodies of Commissioners to be called 'The Singapore Harbour Board' ". Part XII of the Ordinance is headed "Rights and Duties". It contains only one section, 73, which is in terms permissive: "The Board may etc". It is admitted that it was this section which gave the appellants authority to undertake the operations in the course of which the loss now being considered occurred. To this may be contrasted section 75. This latter section is the only one, apart from matters of accounting and internal organization, which casts any positive duty on the appellants.

From a fairly early time privileges in litigation have been given to persons, natural or juristic, functioning under statutory powers. The kind of privilege has varied as have the types of persons entitled to the privilege. The privileged activities have, however, been for practical purposes the same in a great many acts, both public and private. There is, therefore, a formidable body of case law, much of it earlier than 1893. The Act of 1893 has been interpreted in the light of decisions on earlier acts. The wording of the 1893 Act is perfectly general. There is nothing in the Act itself to exclude the protection thereby afforded from any *intra vires* acts of the protected authorities.

From an early date the Courts have decided that certain activities are excluded. The great difficulty has been to decide which.

It is interesting to note that in the case of *The Ydun*[15] Jeune P. and the Court of Appeal treated the exemption as general to *intra vires* acts. An attempt had been made to distinguish between economic or commercial functions of a local authority and those strictly governmental. "If Parliament decides that a public authority should be so authorized, if it confers on a municipality the right and duty to assume the functions of a trader, it clothes those functions with a public character, and makes them just as much public duties of a public authority as those for the performance of which that authority was created. If a municipality is authorized to supply water or gas, I can see no distinction in character between its acts, its contracts, and its defaults, in supplying those articles, and its acts, contracts, and defaults in repairing roads or maintaining street lamps" (at p. 240). As the privilege given by the Act is arbitrary, so in construing it the Courts have invented exceptions equally arbitrary. One of the first of these breaches was made in the case of *Sharpington v. Fulham Guardians*[6]. That was a case of pure contract, that is, apart from contract, there would be no cause of action at all. The decision was, I think, influenced by pre-1893 authorities. Counsel for the plaintiff cited *Midland Railway Co. v. Withington Local Board*[7]; *Davies v. Swansea Corporation*[8]; *Wallace v. Smith*[9].

The case of *Wallace v. Smith*[9] is instructive. That was an act which gave a privilege of a different kind, the right to notice of action to privileged acts, the same as under the 1893 Act.

Lord Ellenborough said, at p. 122, "The notice certainly applies to all actions of trespass and tort. Whether it extends to assumpsit I should doubt". In the earlier case of *Irving v. Wilson*[10] it was assumed that such protection did not apply to an action of assumpsit. The basis of the doctrine seems to have been that notice was required in order to enable the defendant to tender amends and that this could not apply to assumpsit.

The plaintiff had tried to waive a tort and bring an action in assumpsit for money had and received. This he was not permitted to do.

In *Davies v. Swansea Corporation*[8] it was admitted that (under 11 and 12 Vict. c. 83, the Public Health Act, 1848) notice of action was not required in an action on conract arising out of a conract to construct a sewer.

Midland Railway Co. v. Withington Local Board[7] was an action for money had and received and the plaintiffs tried to bring the matter within the exception, apparently well established by that time, of actions on contract. It was decided that the exception did not extend to what the confused terminology of the time described as implied contracts. They would now be called quasi-contracts. Brett, M.R. at p. 794, puts forward the doctrine in its modern form :—

> "I incline to think that the draftsman of this section (The Public Health Act, 1874, s. 264) had his mind directed to actions of tort; it rather applies to actions sounding in damages; but the question is what is the meaning of the whole section? I am prepared to say that it applies to everything intended to be done or omitted to be done under the powers of the Act. . . . . It has been contended that this is an action in contract, and that whenever an action is brought upon a contract, the section does not apply. I think that where an action has been brought for something done or omitted to be done under an express contract, the section does not apply; according to the cases cited an enactment of this kind does not apply to specific contracts. Again, when goods have been sold, and the price is to be paid upon a **quantum meruit**, the section will not apply to an action for the price, because the refusal or omission to pay would be a failure to comply with the terms of the contract and not with the provisions of the statute."

This is interesting. Before this the exception in actions in contract had always been connected with the question of tender of amends. The arguments of counsel were mainly based on the question of tender, but Brett, M.R. for the first time tried to justify the exception on grounds more rational and less technical and even obsolete.

In *Sharpington's case*[6] the question tender of amends disappears but the argument is substantially "The plaintiff is not suing in respect of anything done or omitted under the defendant's statutory powers or public duties, but for breach of their private duty to him under the contract". This re-echoes the judgment of Brett, M.R. in the *Withington case*[7]. Counsel for the local authority admitted that the rule would not apply to a purely incidental contract, "but it applies to every contract entered into for the direct object of carrying out their powers".

Farwell, J. in his judgment made no reference to the pre-1893 cases. He does not seem to have intended that all contracts should be outside the Act, but he seems to have assumed that the Act could not apply to all contracts and, in the attempt to draw a line somewhere, to have made a distinction between direct and incidental in reference to acts done under statutory powers. He quotes Romer, L.J. in *Ambler v. Bradford Corporation*[11]. That was a tort case and the suggestion that Farwell, J. found in the remark of Romer, L.J. is obiter, even if it was intended. The word "direct" thus introduced has a considerable part to play in the subsequent history of the Act.

Another line of attack was based on the distinction of duties and powers vested in the protected authority. In *Parker v. London County Council*[12] an attempt was made to get round the Act with the assistance of what may be called the railway cases, *Carpue v. London, Brighton and South Coast Railway*[13] and *Palmer v. Grand Junction Railway*[14]. In *Palmer's case* a railway company had in its private act obtained privilege for its acts in terms similar to those in the 1893 Act and by its negligence had caused damage to certain horses which were being carried on the railway. Parke, B. giving the judgment of the Court of Exchequer said, at p. 766.

"The second objection is, that the Lord Chief Justice was wrong in ruling that no notice of action was required. That turns on the question, whether this is a case in which notice was requisite by the 214th section of the act. If the action was brought against the Railway Company for the omission of some duties imposed upon them by the act, this notice would be required. If, for instance, it was founded on a neglect in not duly fencing the railway, on account of which the travelling on it was dangerous to those passing along it, assuming that such an obligation resulted from the 150th section, or from the general provisions of the act, that case would have fallen within the 214th section. But, when the matter is looked at and explained, it appears that the action is not of that nature, but the defendants are sued as common carriers, who have received nine horses for the purpose of being taken to their journey's end, which they have not so delivered etc.: the action is brought against them, therefore, in their character of common carriers; and it appears to me that a breach of their duty in that character is not a thing omitted to be done in pursuance of the act, or in the execution of the powers or authorities given by it. The act does not compel them to be common carriers; it only enables them to be so, so far as they shall think fit; and when they have elected to become so, they are liable in that character, in the same way that other common carriers are."

The arguments in the case were highly technical and it would seem that counsel sought to treat the matter on the same lines as the assumpsit cases. I am not sure that the Court intended to decide otherwise. This case was followed in *Carpue's case*[13] which did not carry the matter further.

In *Parker's case*[12], counsel based his argument on the distinction between the character of the defendants as owners of the tramway and as carriers. Channel, J. declined to apply the railway cases, which had not been followed in *Kent v. Great Western Railway*[15].

In *Lyles v. Southend Corporation*[16] the plaintiff, who was a passenger on the defendants' tramway, tried to get round the Act by suing in contract. The Court decided against his contention on the ground (inter alia) that the defendants were not only permitted but obliged by the terms of their order to carry passengers. The Court intimated that if the plaintiff had been carried by a special contract the result would have been different.

In the year 1907 the matter was considered by the House of Lords for the first time in *Pearson v. Dublin Corporation*[17]. The matter was not considered in detail but the decision of the House implied that a fraud committed by the servant of a public authority in order to induce another person to enter into a contract with the public authority was not within the protection of the statute. Lord Atkinson referred to *Sharpington's case*[6] with apparent approval.

The next case of importance was *Bradford Corporation v. Myers*[18]. This case arose out of a tort committed in the course of the performance of a contract made by the appellants in the course of their duties as gas undertakers. The Corporation was obliged to supply gas and authorised to sell coke. The distinction was stressed in the judgments of the House and this stress caused the actual decision to be misunderstood. In view of later cases it must be taken to be limited to cases in which there is a contract and either a breach of contract or a tort arising out of the performance of that contract. When there is no contract there is no distinction between activities which are obligatory and those which are merely permissive: *Griffiths v. Smith*[19].

The case of *Myers v. Bradford Corporation* is interesting for several reasons. One of them is the fact that the original basis of the exclusion of actions on contract was forgotten or at least overlaid. Originally the matter had rested on technical questions of procedure. Now it appears to rest on the ground suggested by Brett, M.R. that the performance of a duty under a contract is not or rather may not be the performance of a duty under a statute. This was not entirely made clear by the judgments, as is shown by the fact that the effect was misunderstood. In the *Torquay Corporation case*[20] which was a case in tort of invitor and invitee, the decision was based on the distinction of permissive powers and statutory duties. The *Bethnal Green case*[21] cannot be distinguished but it was decided in the opposite sense. In *Myers' case* I think that confusion was caused by the words of Lord Shaw (at p. 263), "And I will venture to add, my Lords, that it will be found that the position, not of the one party, but of both parties, must rest on the same foundation. If there be a duty arising from statute or the exercise of a public function, there is a correlative right similarly arising". This gave rise to the impression that there must be a right that could be enforced in the Courts. The consequence of such an assumption are shown in the case of *Western India Match Co. v. Lock*[22]. There the public authority

was an officer of the Crown and the Crown cannot in any event be compelled to carry out any duty.

In *Griffiths v. Smith*[19] the defendants were a public authority but they could not be compelled to perform any duty as they were permitted by statute to cease to function as a public authority at any time. In that case Lord Maugham said (at p. 185) :—

> "It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or a power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade. The words in the section are 'public duty or authority,' and the latter word must be taken to have its ordinary meaning of legal power or right, and does not imply a positive obligation."

In the popular interpretation of *Myers' case* all the emphasis was on the word 'duty'. The distinction between duty and authority was overlooked.

A great deal of argument was devoted in the present case to the question of whether there was a contract between the parties. I think that it was quite probable that there was, but I regard the question as immaterial. In the first instance there was certainly a contract between the appellants and the shipowners and what was done in performance of that contract. If the existence of a contract were sufficient to displace the protection of the Ordinance there is certainly a contract. In *Myers' case* the result would have been the same if the coke had been thrown through the window of a stranger to the contract; it was done in performance of the contract.

I think that *Myers' case* should not now be considered as depending entirely on the existence of a contract. I think that too much attention has been paid to the consideration of whether there was or was not a contract. I do not think that that was the criterion.

I think that Lord Porter put the matter correctly when he said in *Griffiths' case* (at p. 208) "I think it is true to say that a private contract even if entered into in pursuance of an Act of Parliament is not thereby protected but an act which is done in performance of a public duty is still done in the execution of a public duty though it is performed through the medium of a contract". There are many public authorities which can only exercise their functions through contracts. A housing authority performs the duty of housing by entering into contracts with tenants. No member of the public has a right to a house. The right, such as it is, is of imperfect obligation and belongs to the public at large. It is open to the housing authority to decide to whom they shall let houses.

In the *Western India Match case*[22] the public generally had no right to ship goods; the duty of the public authority was to limit shipments to those helpful to the prosecution of the war. Such goods as were shipped were shipped no doubt in pursuance of contracts of affreightment. But the shipping of the goods was no doubt the exercise of a public authority.

There is no doubt that an exception has been grafted on to the act. I have tried to explain how the trouble started and how the nature of the exception has changed and how it has ceased to be purely procedural. There is nothing in the Ordinance to justify the exception and if it were a question of construction of a modern act the trouble would not have arisen. I think that care should be taken to ensure that the exception is not enlarged.

In the present case the appellants are a public authority incorporated to carry on a trade. To do that they are given certain powers. As long as they use those powers to carry on that trade, in my opinion, they continue to exercise authority under that Ordinance although they can only carry on that trade by entering into contracts with shipowners and others, though no particular ship has a right to use the docks. In the words of Lord Shaw in *Myers' case* (at p. 262) "when the act or neglect had reference to the execution of their duty or authority — something founded truly on their statutory powers or their public position — to that, and that only, will the limitation apply". I think that the distinction is between performing the public duty or authority and doing things to enable the authority to perform those duties or authority, e.g. making a contract for the erection of a building. I am afraid that one cannot decide these cases without the use of some such expression as indirect, incidental, etc.

In my opinion, in the present case, the appellants were directly performing their duties under the Ordinance, their duties as dock owners, even though the particular operation was not an essential part of the work of a dock authority, and it may be that in most cases dock authorities leave persons interested to make their own arrangements. The appellants were entitled to use their discretion in the use of the powers conferred by the Ordinance. The exception might come into play if they had entered into a contract for the building of a house for an employee, a thing permitted but not the duty or the function of a dock authority as such.

In my opinion the appellants are entitled to the protection of the Ordinance and the appeal must be allowed with costs.

Evans, J. : — The appellants are a body incorporated under the Ports Ordinance (Cap. 149) with certain powers to manage the Singapore Harbour, and they appeal from a judgment given against them for $2,053.10 and costs. The action in the High Court was brought by respondents in respect of certain tyres shipped to them by their associated company in Bombay in S.S. Samokla which discharged here between 11th — 14th July 1946. The respondents claimed that the appellants failed to deliver to them 17 tyres received by them from the ship.

The appeal was brought on three grounds, that the learned Judge was wrong in finding that there was an implied contract between the parties; that the appellants were negligent in not inquiring of some B.O.D. whether tyres had been misdelivered to them; and that the appellants were not entitled in this case to the protection of the Public Authorities Protection Ordinance (Cap. 14).

The ship discharged alongside and the tyres were checked ashore by the ship's agents and passed at once into the hands of the appellants' employees, who removed them to the appellants' warehouse where they were checked in by appellants' clerks. The consignee was anxious to obtain early delivery and removed the goods from the warehouse as they arrived so far as he was able with the transport supplied and without working at nights. When all were removed seventeen, which should have been in the warehouse, were found missing. The appellants at that time denied receipt.

The respondents on notification of shipment communicated with the ship's agents in Singapore and on a guarantee received from them a Delivery Order on the appellants. This order was endorsed "Please collect all charges and store rent from consignees". This Delivery Order the respondents passed to the appellants on 4th July before the ship came alongside and appellants retained it. The goods were shipped under a Bill of Lading which provided *inter alia* that "The Company shall have the option of making delivery of goods either over the ship's side or from lighter, or store ship, or hulk, or Customs House *or warehouse* or dock or wharf or quay at consignees' risk".

A contract should only be implied where the circumstances necessitate it, and the relations presumed should be the simplest consistent therewith. A right to delivery is not a contract. A holder of a Delivery Order is in a position to demand the goods referred to therein. If he does not wish to take delivery at once from a bailee, and leaves the goods with the bailee after the latter has notice of the order it may be necessary to presume a contract, and there will be a transfer of the right to possession. Cases regarding goods continuing in the hands of a bailee after issue of a Delivery Order have no bearing on this case. Bailment is a transfer of possession, and the bailment here was clearly direct from the ship to appellants. The shippers could nominate the mode of delivery, and in my opinion the Delivery Order was an intimation of the mode chosen. The respondents' consent or agreement was immaterial. In such circumstances it is difficult to understand how a contract can arise. The point is not essential, as, even were the Delivery Note taken as an offer to deliver in the manner indicated, it was accepted by the respondents, but delivery was by the ship's agents chosen and instructed by them. The respondents had only a right to delivery. The parties' relations seem clear, and to require no implied contract.

The basis of the claim, however, and the link of the parties' relation is the appellants' dealings with respondents' property. Mr. Smith carefully confined himself to implied contract as found by the learned Judge and respondents' Counsel did not seek to take the claim farther. It seemed to be thought that were the claim in tort, the statutory plea would be good, but no case founded on tort has been held barred on that ground only. The Statement of Claim, however, clearly alleges in paragraph 3 the respondents' right to delivery and in paragraph 5 the demand for the goods and the failure to deliver. The case is in my opinion, one of detinue. It is true that detinue by bailment has been said to partake of contract, but the original action in detinue is far older than assumpsit. Moreover, the averment of bailment in such case was not traversable. The only element of contract was not in issue, so that, as I understand it, the point here could not have been raised. It may be that the learned Judge refers to this as an implied contract, the passage in his judgment which Mr. Smith cites and attacks at page 131 is not quite clear. I do not think that a bailee of goods for safe keeping ceases to be liable in detinue by reason of a Delivery Order having been issued, because the bailor can no longer demand delivery, and there is no bailment by the person who can now do so. To such a claim loss is no answer, and I can find little more in the defendants' various excuses and the state of the facts. The case of *Reeve v. Palmer*[23] applies. That case concerns deeds in the custody of a solicitor, but Cockburn C.J. speaks only of a duty to take ordinary care of the articles. On the pleadings and as the case has been fought it might

be said there is a plea of theft, but that plea has wholly failed. The plaintiff need not allege negligence, nor anything more than demand and refusal of his own goods; of course, negligence is no defence. It can only arise after there is, at least *prima facie* evidence of a theft, when there might be a question of whether the loss on the theft was attributable to appellants' negligence as in *Coldman v. Hill*[4]. The cases cited appear to me remote. Animals have wills of their own. Barges are subject to natural forces, and perils, against which special steps may have to be taken, but in each case the cause of loss, rising tide, or founding under another ship were known, and, in the latter case, the reason the barge could not be redelivered. In the cases involving theft, the theft was proved or admitted. In these circumstances I do not think the appeal can succeed on either of the first two grounds.

That leaves what the parties describe as the principal point of whether the respondents' action is barred by the Public Authorities Protection Ordinance (Cap. 14). This Ordinance corresponds to the former English statute. The leading case under that statute seems still to be *Bradford Corporation v. Myers*[18], but we are told that the later cases have blurred the lines traced therein. In that case, however, Lord Haldane gave clear warning of the vanity of seeking exact and comprehensive principles in these cases. *Ex hypothesi* the duty which the alleged public authority is exercising is, usually, the creation of statute, and statutes appear drawn on no certain principles. We were offered fresh guides in whether the act complained of was done for profit, or whether it was one tending to the public benefit. These are but will of the wisps. Dicta referring to these considerations may be found, but they are indicative of the variety of the duties. Lord Simon seems clearly to be speaking in this sense in *Griffiths v. Smith*[19]. Had the House of Lords in that case insisted that the duty must be one legally exigible, it would have amounted to saying that voluntary and altruistic acts, whatever their other qualities, could never be regarded as performed as a public duty. On the other hand a public duty does not cease to be one because the doer is paid for doing it nor is there distinction between one paid in wages and one whose reward bears a more direct relation to its usefulness. Again the actor's freedom in disposing of the fruits of his works may be some indication of the width of discretion or freedom in which he acts.

The difficulties arise from the endless variety of the duties. In some cases the authority may be a governing body, as indeed was the Bradford Corporation, but it was also empowered to carry on a gas undertaking from which it was required to provide gas to consumers within its area, and was permitted to engage in a coke trade. For the supply of gas it became a public utility body, and the case turns entirely on the variation in the wording of the sections of their own Improvement Act and that of the defunct gas company. In the *Western Indian Match Co. v. Lock*[22] the public authority was a wartime "Competent Authority" with very drastic powers indeed, but for a limited time and purpose. The exact position of the authority, and the sanction of his duty is not made clear. The Lord Chief Justice says it "might be one of imperfect obligation" and then that it "was not a duty the courts would enforce" — but I do not think there is a definite finding, for the point was thought of secondary importance as the quotation from Lord Maugham shows. It seems clear the Competent Authority was himself a man under authority, and the Attorney-General compares him to a servant of the Crown carrying out a lawful order, so that wide as his powers appear and wider though his powers might be, he was strictly controlled. He was strictly accountable and exercised his powers in the King's service. The case was decided, as I understand it, on the ground that not only had he a power to requisition the ship but was under a duty both so to do, and to use it in the public service for the prosecution of the war. That duty was exigible by his superiors if not by the courts in all cases. The loss obviously occurred in the performance of that duty, which is a public duty.

This case does not in fact seem to go so far as *Griffiths v. Smith*[19]. There the defendants were managers of a voluntary school, that is one of a kind which in origin were charitable institutions carried on by the owner, providers or managers. They had become a statutory body by virtue of the statutes, but these seem largely to be for control and regulation. The work may have been undertaken voluntarily and performed gratuitously. The law Lords seem to have had difficulty in defining their duty. Lord Simons said "It was strenuously contended for the appellants that this action was 'voluntary' . . . . . The real question is, whether the managers, in authorizing the issue of invitations to the display on the school premises after school hours, should be regarded as exercising their function of managing the school". Lord Porter says much the same adopting the words of the Master of the Rolls and assuming, with him, that "carrying on a public elementary school in execution of the act" is a public duty. Lord Wright

says clearly "what was being done was, in my opinion, clearly done as an item in the management of the school which was a public duty obligatory on the managers so long as they continued it". It seems easy to see that persons devoting their time, or property to such a purpose are performing a public duty, even if it be not so simple to define its obligation, or its extent, but that case is very different from this. So different, in my opinion, as to have little bearing on it.

That the Singapore Harbour Board is a public Authority is in this case admitted. We have only to consider whether the loss occurred in the execution, or intended execution of its public duty or authority. I agree with the learned Judge who tried the case that *Palmer v. The Grand Junction Railway Co.*[14] and *Carpue v. London and Brighton Railway*[13] afford the best illustration of the principle, the authorities being public utilities and monopolies empowered to do certain acts and to do certain trades, but the cases are not as such conclusive. For the reasons set out the case must turn on the existence of a public duty, and this whole case turns on the Ports Ordinance (Cap. 149) which creates the authority and clothes it, if at all, with powers and duties.

This Ordinance begins by severing the Board's predecessors' connexion with the Crown, and by setting up this and another statutory Corporation (Sections 2 and 4). It goes on to transfer to it a large quantity of Crown land without specifying the tenure, but of the nature of ownership, and subject to a floating first charge in favour of the Crown, but otherwise without limitation on the ownerhip or use of the land (section 30). By section 29 the Board has full powers to lease its land, subject, in the case of a lease for more than 3 years, to written sanction of the Governor. It can let from year to year and long leases in Singapore seem uncommon. The Board's powers to contract (section 41) throw no light on their public duties, and are related only to their "current business" a term not suggestive of duty. The Board under sections 46 — 50 is free to fix its own rates, and consequent profits, without reference to any tribunal. Such rates are subject to approval by the Governor in Council but, apparently, on the advice and after hearing the Board alone, for there is no provision for publishing proposed rates nor for objection thereto. Section 73 is headed "Works and Duties" but the marginal note reads "Board empowered to do certain works etc." and seems a more accurate description. The draftsman would appear sedulously to have avoided imposing any duty on this official or semi-official body, and the only section which admittedly does so, is section 75, requiring it to provide public landing places. There is nothing to correspond to Section 1 of the Coal Industry Nationalisation Act 1946 (9 & 10 Geo. 6 c. 59) which sets in the forefront the duties of the Coal Board, nor, to take a case nearer in time and subject matter, to section 2 of the Port of London Act 1908 (8 Edw. VII c. 68). Section 4 speaks of the duty of carrying out this Ordinance being vested in the Board. This only throws us back on the ordinance to discover the duties and powers while the word "vested" suggests that the word "duty" is used in the same peculiar sense as in the Heading. The section is principally concerned with defining the Board's sphere of activity.

Section 73 is the only section to which the parties made much reference. The relevant provision reads "The Board may.....(c) carry on the business of wharfingers and warehousemen.....". The appellants emphasised the word "Duties" in the heading and argued that "may" might often be read as "shall'. It might also be said that some of the matters specified would generally be supposed to be among the duties of a Harbour Board such as the maintenance and repair of wharves and docks. The argument however goes much too far. As the section is drafted all the matters therein are in the same category. There is but one "may". These matters are very varied including (c) building ships, (e) generating electricity, and (p) insuring goods in their custody The heading is so vague as to be almost meaningless. It can not be read as indicating a power to construct and a duty to use, for the Board can quite properly build warehouses and let them to persons carrying on that trade, while there could be no obligation to use the ships they build. I can see no reason to read the section otherwise than as an enabling section as it appears at first sight, and in accordance with the marginal note.

The argument on this point was confused to some extent with another like it, that the Singapore Harbour Board is under a duty to manage the port and that its dealings in this case were essential to that duty and not merely incidental. On this argument as it stands I should have been inclined to say the work here is incidental only, and that the essential functions of such a board are the maintenance and repair of wharves and docks, and the land and sea approaches thereto. Even if, as here, it is a considerable neighbouring land owner it can quite properly lease warehouses should it find it necessary to build them. Should they not be let it might be necessary to manage, but there is no evidence of all this. The whole argument, however, appears to me impermissible. It asks the court to read into the Ordinance just such a section as the legislator has

deliberately omitted for some reason or another. It cannot be said, but in the loosest sense, that the Harbour Board is under a vague, implied duty to manage, even as the defendants in *Griffiths v. Smith*[19] were under a duty to manage the school. The Board is entirely the creature of this Ordinance in a way the managers were not of the Education Acts. It is brought into separate existence in contradistinction to its predecessors, and then only vested with property. It has never been suggested that its status or duties are in any way affected by its predecessors. Doubtless the members of the Board should do their duties in that state of life to which it may please God to call them, and that duty may be deemed a public one, but it is one they share with all mankind. I can find no more definite duty laid upon them in this regard. In fact the Board has many powers; it carries on a business, as section 41 of its ordinance says, on its own land, with a wide choice of extension, and at a profit fixed by itself with very little check. If its business is in part to the benefit of the community it shares this character with many others.

The Board is seized of a large area of public land in the neighbourhood of the docks amounting according to the Schedule to the Ordinance to over 1 square mile. It may be under a duty to develop this to the best advantage. Were the appellants sued in respect of their general use and occupation of the premises, or the maintenance of any necessary works thereon, I think they could plead the Ordinance. If the act arose in building warehouses to develop the site, it might be in the same position; but I can see no public duty to run a warehousing business. The public have not, so far as we know, been consulted, and the Board is not elective. The public may well prefer dealing with competing private traders to dealing with a monopoly and one which will plead the Ordinance to escape its liabilities. Nor can it be said in the words of Lord Porter in *Griffiths v. Smith*[19] that the Board "have adopted a course of action which imposes upon them the performance of a public duty at the material time" and the default is in carrying it out. The words of Lord Maugham are more applicable "the act was in substance done in the course of exercising for the benefit of the public an authority or power conferred on the public authority not being a mere incidental power, such as a power to carry on a trade". There is no evidence the Board is acting for the public benefit, and it is carrying on a trade. By its own Regulations Sections 32A and 39 the Board is under no duty to receive all goods, nor all goods discharged. Its liability here arises directly out of a contract express or implied it chose to make with the shipping company in the course of conducting a warehousing business. The case is to me indistinguishable from that of *Bradford Corporation v. Myers*[18].

In my opinion therefore the appeal should be dismissed.

Gordon-Smith, J. : — I have had the advantage of reading and considering the Judgments of my learned colleagues which have just been delivered. Both such Judgments have dealt at length with the points raised in argument on the Appeal before us. The first main point was as to the legal relationship between the parties and on which, on the findings of the learned Trial Judge, a further point of negligence arose. The other point was entirely separate and distinct and on which the question of applicability of the Public Authorities Protection Ordinance, Cap. 14, arose. If the learned Trial Judge had found in favour of the appellants on this later point, then the other point or points did not arise for decision and discussion thereon would have been merely academic. A lot of time would therefore have been saved and argument avoided had this latter point been taken as a preliminary issue.

Both my learned colleagues have dealt at some length with this first point and are in agreement that the matters arising thereon could have been more simply pleaded and argued as one of plain and straightforward detinue and not of one of implied contract arising out of bailment, and both my learned colleagues having examined the matter, have come to the conclusion that, even so, the Answers by the appellants on the findings of fact by the learned Trial Judge, would not have been successful in either event. I agree, generally, with their conclusion and have no more to add.

On the remaining point and after detailed reasoning, Evans, J. finds that to him the present case is indistinguishable from that of *Bradford Corporation v. Myers (the Coke case)*[18], and that therefore the appellants are not entitled to the protection of the Ordinance and he would dismiss the Appeal. On the other hand, the learned Chief Justice, after examining this and other cases in detail, comes to a contrary conclusion. There is therefore a conflict of opinion between my colleagues and it is necessary for me to express my opinion in some detail.

There is no conflict of opinion at all as to the appellants being a Public Authority, as found by the learned Trial Judge. After examining the authorities

and in particular the *Bradford Corporation case*[18], he makes a distinction between a dealing by the respondents as members of the public in the course of an implied contract which was truly founded on the appellants' statutory powers or public position, and a dealing with the appellants as individuals in the course of an implied contract which was merely an incident in the carrying on of a business by the appellants as warehousemen. He found that the transaction was analogous to that of the individual who contracted to buy the coke from the Bradford Corporation, and accordingly that the action was not barred by the Public Authorities Protection Ordinance. On reference to this Ordinance, I think, some light is thrown on the matter by the long title "To provide for the protection of persons acting in the execution of statutory *and other public duties*", and which makes a distinction between statutory and public duties. In effect, the long title of the Act of 1893 is in the same terms. The appellants are a statutory Board created and established by the Ports Ordinance (Cap. 149) and by Section 4, a statutory duty is imposed on them to carry out the provisions of the Ordinance. The only mandatory statutory provision imposed on the appellants vis a vis the public, is that contained in Section 75 which enacts that the Board shall provide free landing places. Sections 73 prescribes what they may do in carrying out their duties and it is obvious that such duties must necessarily be permissive and not mandatory. In effect, the Board is the Port Authority for the Colony authorized, but not compelled, to construct and develop progressively all the necessary wharves, docks, warehouses, facilities and conveniences as set out in Paragraph XII, Section 73, headed "Works and Duties". Because such rights and duties are merely permissive and not mandatory, are they excluded from being "other public duties"? I do not think so. Both the learned Trial Judge and Evans, J., base their decision on the *Bradford Corporation case*[18] in which there was not only a specific trade contract entered into but a proved and obvious tort committed by the Corporation agents in carrying out such contract. The facts, at least, can clearly be distinguished. The learned Chief Justice has examined this case at some length and also the later case of *Griffiths v. Smith*[19] and these two cases are much more relevant than many others quoted to us and both of them were Appeals to the House of Lords and in the latter of which the learned Law Lords examined and, I think, to a great extent clarified their earlier decision.

In *Griffiths v. Smith*[19] the Lord Chancellor in his speech drew particular attention to the warning given by Lord Haldane in the *Bradford Corporation case*[18] that it might be difficult to extract from the words of the Act a comprehensive principle which would serve as a complete guide for the future and quoted Lord Haldane as follows: "In such a case, the Court can only take the particular facts in the case before it, and decide as best it can whether they come within the words, or they fall altogether outside them".

As I have said earlier, the provision of docks, wharves, warehouses and all the other items enumerated in Section 73 of the Ports Ordinance is permissive and not mandatory but having elected so to provide such conveniences and facilities progressively in carrying out their multifarious duties of a Port Authority, the question, so it appears to me, is whether by so doing, the appellants have done something which is incidental to, part of, the process of carrying on their statutory duties, as a Port Authority. In effect, the protection afforded by the Act and Cap. 14 is limited to Public Authorities and it is not disputed that the appellants are such a public authority and as Lord Maugham said in his speech in reference to the *Bradford Corporation case* (at p. 185) "It is not essential that a Public Authority seeking to rely on the Act of 1893 must show that the particular act or default in question was done or committed in discharge or attempted discharge of a positive duty imposed on the Public Authority. It is sufficient to establish that the act was in substance done in the course of exercising for the benefit of the public an authority or power conferred on the Public Authority or a power conferred on the Public Authority not being a mere incidental power, such as a power to carry on a trade".

It seems to me clear that the appellants were carrying out a public duty in transferring goods discharged from a ship alongside the wharf by the ships' crew on to the wharf, to their own godowns or warehouses, pending future delivery to the consignees.

The fact that the consignees had previously handed to the appellants a formal Delivery Order instructing delivery of such goods to themselves does not, in my opinion, affect the matter one way or the other, nor does such Delivery Order constitute a contract between themselves and the appellants. It may be that in the course of such transference or during the period of temporarily warehousing the goods the consignee suffers some private injury or wrong in relation to such goods, due to the default or negligence of the appellants, but the question is whether it was committed

by the appellants in the execution or intended execution of a public duty or authority. In my opinion, this was so and the appellants are entitled to the protection of the Ordinance. I therefore agree with the learned Chief Justice in thinking that on this ground the action fails and the Appeal should be allowed.

Appeal allowed.

CHUA YAM QUEE v. PEENA MOONA MOHAMED ABDUL HAMEED & ANOR.

[Court of Appeal (Murray-Aynsley, C. J., Evans and Thorogood, JJ.) May 4, 1950]

[Singapore — Civil Appeal No. 2 of 1950]

Debtor and Creditor (Occupation Period) Ordinance, 1949, s. 4(2)(b)(iii) — Mortgage paid off during Japanese occupation — Meaning of "such extended period as was mutually agreed".

This was an appeal against the judgment of Gordon-Smith, J. reported in (1950) M.L.J. 81. The facts were shortly as follows:— By an Order of Court of the 24th September 1941 the respondents were authorised as trustees to mortgage the property in question and in pursuance thereof by Mortgage dated 11th November 1941 conveyed the property to the appellant. The amount of the mortgage was $17,000.00 expressed to be repayable on the 11th December 1941 and interest thereon. By notice dated 28th April 2603 (1943) the appellant required payment of the mortgage. As a result the respondents had to apply to Court to sanction a fresh mortgage and this caused delay in payment. The appellant did nothing to enforce his security by sale or foreclosure and eventually after considerable delay and correspondence the mortgage money and all interest was repaid and a Reconveyance dated 9th February 2604 (1944) was executed and registered in the Registry of Deeds on the 18th of March 1944. On the 26th September 1949 the appellant gave a notice to the Registrar of Deeds under s. 18 of the Dealings in Land (Occupation Period) Ordinance, 1949, prohibiting any dealings with the land without due notice. The respondents thereupon applied by Originating Summons (a) for an Order to declare that the mortgage was discharged by the Reconveyance of 1944 and (b) for an Order that the notice in the Registry of Deeds be removed and the Registry of Deeds be rectified. The appellant, who was the respondent to the Originating Summons, claimed under s. 4 (2) (b) (iii) of the Debtor and Creditor (Occupation Period) Ordinance a revaluation and argued that the amount due had not been paid "within three months of demand or within such extended time as was mutually agreed between the creditor or his agent and the debtor or his agent." Gordon-Smith, J. held that on the facts of the case the period for repayment had been extended by mutual agreement. The appellant appealed.

Held, Per Murray-Aynsley, C.J.: that in this case there was in fact no mutual agreement to extend the time and no such agreement could be inferred from the conduct of the parties. The words "mutually agreed" in s. 4 (2) (b) (iii) of the Debtor and Creditor (Occupation Period) Ordinance, 1949, do not necessarily import an express agreement. As in the formation of a contract, agreement can be inferred from conduct. But since a mortgagee whose power of sale has arisen cannot refuse the mortgage money when tendered, it is impossible in this case to infer from the conduct of the parties any "mutual agreement" to postpone the date of repayment.

Per Evans, J.: The word "mutually" may seem tautologous and the consent of the debtor may appear immaterial; but the word "mutually" must be taken to have been deliberately inserted in the section and its meaning sought. It seems to be intended to mean a clear consent on both sides and to exclude all such matters as acquiescence and implied consent.

Per Thorogood, J.: The respondents' counsel having admitted that the mortgagee was bound to accept payment of the mortgage money when tendered there was nothing to justify the finding of the learned Judge of the Court of first instance that mere acceptance after the date fixed by the mortgagee for payment implied mutual agreement to extend the time so fixed. Normal principles of contract have been taken away by the Debtor and Creditor (Occupation Period) Ordinance, 1949, which was enacted to meet special circumstances arising from certain conditions obtaining in Malaya after 31st December 1943 and which must be strictly interpreted.

Semble: that full weight must be given to the use of the word "mutually" in the expression "mutually agreed".

APPEAL from the judgment of Gordon-Smith, J. reported in (1950) M.L.J. 81.

John Laycock and *Chong Thutt Pitt* for the appellant.

G. E. N. Oehlers for the respondents.

Cur. Adv. Vult.

Murray-Aynsley, C. J.: — This appeal raises a very short point under section 4 sub-section 2 (b) of the Debtor and Creditor (Occupation Period) Ordinance, 1949.

The facts are not in dispute and are set out in the judgment appealed from. The only question is whether the mortgage monies were repaid within three months of demand or within such extended period as was mutually agreed. The monies were not paid within three months; the question, therefore, is whether a further period was mutually agreed. I do not consider that the words "mutually agreed" necessarily import an express agreement. As in the formation of contract, agreement can be inferred from conduct. Can agreement be inferred from the conduct of the present appellant?

It is necessary to consider the circumstances of the time when repayment was made. The appellant was in the position of a mortgagee who wanted to be repaid. The respondents, the mortgagors, were trying to raise the necessary funds and, with the value of money falling all the time, had every reason to postpone the repayment as long as possible. After granting extensions from time to time the appellant finally refused any further extension. The money had not been repaid but the respondents were taking steps to secure the necessary funds.